No. 72

IN THE

# Supreme Court of the United States

*October Term, A. D. 1933.*

CONCORDIA FIRE INSURANCE COMPANY,
a Corporation,
*Appellant,*
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
*Appellee.*

*Appeal from the Supreme Court of the State of Illinois.*

## REPLY BRIEF FOR APPELLANT.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

## REPLY BRIEF FOR APPELLANT.

We believe it will be of assistance to the Court if a brief restatement is made of appellant's contentions in the light of the argument submitted by the appellee.

I.

In the first place, the contentions of the appellant are all sustainable even if Sec. 30 of the Act of 1869 is not declared unconstitutional. We have in mind the decisions in which this Court has often pointed out a way in which a statute under attack could be so administered as to eliminate discrimination or inequality. Such, in the Hanover case, was clearly the decision of this Court as to this particular statute. The substantial rights of the appellant and of the other companies concerned in the instant case would be

tected if this Court were to refuse to declare the act unconstitutional but were to hold that the foreign companies cannot lawfully be taxed on receipts from casualty business* as long as competitors in that field are exempt; that in determining net receipts with a view to their taxation *as property*, losses must be deducted, as well as expenses; and that, treating section 30 as imposing a property tax, the same percentage of debasement must be applied as in the case of all other property.

Since this is the position of the appellant, it is wholly unnecessary to consider the contention of the appellee that a tax on the net receipts of foreign companies is a reasonable form of taxation. This may be conceded, if proceedings under the Act are controlled by the principles of equalization in the three particulars just specified. Nor is it necessary to debate the suggestion in the appellee's brief that some other form of tax would be fairer than a net receipt tax and that, if laid, such other tax would impose a heavier burden on the appellant. This case concerns Sec. 30 of the Act of '69. Of course it is possible that this Court will be discouraged by difficulties in the way of a fair administration of the Act of '69 as an Act taxing *property*. In this connection it was suggested in appellant's original brief that some of the difficulty results from taxing intangibles elsewhere than at the domicile of the owner. But the point is not essential to appellant's contention and is not pressed. The only question before the Court, therefore, is whether this particular statute can be so administered as to achieve equality of treatment. If it can (and the appellant concedes that it can) then the relief prayed for can be given without a declaration of unconstitutionality.

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*For convenience of statement the term "casualty business" is used in this brief as comprehending all types of business done by appellant other than fire, marine and inland navigation.

## II.

In the next place, we submit that the record discloses all the facts necessary to raise the three points which appellant presses. We understand the following statements of fact to be undisputed:

(1) During the years from 1923 to 1926 inclusive appellant was not assessed for taxation upon receipts from its casualty business but was assessed for taxation in 1927 upon such receipts as well as upon its receipts from fire, marine and inland navigation insurance. The question whether it is unjust discrimination to tax appellant and other foreign corporations of its class upon their casualty receipts when similar receipts by other insurers escape taxation is therefore a question raised only for the year 1927. The question is important not because of the amount of money involved in that year but for the future guidance of the taxing authorities.

(2) In no one of the five years from 1923 to 1927 inclusive were the insurance losses sustained by the appellant deducted by the taxing authorities from appellant's gross receipts before determining the amount of its taxable net receipts. In other words, what the Illinois Court classifies as a property tax was assessed without a determination that there was any property to tax. Since all hands pay the tax on tangible personalty and since the domestic competitors of appellant pay a tax only on such intangible personalty as remains at the end of the year after losses have been paid, the question of discrimination becomes vitally important not only as to the future but also because the amount of money already involved is substantial.

(3) For each of the years from 1923 to 1926 inclusive the Supreme Court of Illinois held that the returns made by the appellant and other companies must be regarded as final because accepted and acted upon by the tax authorities and that the hypothetical computations of the Board of Review must for those years be rejected. The Court itself "debased" the net receipts shown by the appellant's returns (gross receipts less expenses only) to 30 per cent. of their face and, in so doing, to that extent properly applied the principle of equalization announced by this Court in the Hanover case (272 U. S. 494). For 1927, however, the Court sustained the hypothetical computation made by the Board of Review. As to that computation, the record discloses the following situation: the Board *did*, for 1927, include in its computation appellant's receipts from casualty business and did *not* "debase" the net receipts, when determined, to 60 per cent. of their face as required by the principle of equalization.* For the year 1927, therefore, it is clear that the appellant is entitled to relief because of failure to debase—unless the appellee can succeed in its contention that the appellant must be penalized because it declined in each of the five years to make its returns on the form required by the taxing authorities but insisted upon substituting a form of its own.

The validity of appellee's contention upon this point is the next question to be considered.

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*Prior to 1927 there was in Illinois a custom having the force of statute which required the taxing authorities first to debase property valuations to 60 per cent. of their face and then a statute required them to cut this debased value in half so that the tax was finally extended on 30 per cent. of estimated value. In that year the statute in question was repealed, so that for 1927 and subsequent years the debasement applicable to property taxation in general was to 60 per cent. of the estimated value without further reduction.

## III.

In appraising the conduct of appellant in making its returns upon other than the demanded form, the Court will, we trust, be enlightened by the following statement:

During 1922 (the year in issue in the Hanover case) and in each year thereafter down to and including 1927 the taxing authorities and companies of the appellant's class were deadlocked on the question of the validity of the Act of '69 as interpreted by the State. The taxing authorities were insisting that the tax under the Act was an excise tax collectible on 100 per cent. of gross receipts. The appellant and others were insisting that so construed the act was unconstitutional and that if it laid a property tax the same debasement must be applied as in the case of all other property taxation. The taxing authorities were also maintaining that the appellant and others of its class were taxable upon net receipts derived, inter alia, from casualty business. The companies were insisting that taxation on such receipts was an unjust discrimination. The taxing authorities kept demanding that returns be made upon "Form 16" (Record pp. 113-119) acquiescence in which would have conceded the validity of the Act of '69 as interpreted by the State. The appellant and the other companies accordingly substituted and filed in each year a short form of return which gave lumping figures but made no dangerous concessions (see Record p. 100) and these forms, as the Supreme Court of Illinois has found, were accepted and acted upon by the taxing authorities for all the years from 1923 to 1926 inclusive.

The Court will therefore note that this is not the case in which a taxpayer has made *no* return. Nor is the case

one in which the taxpayer's return as filed was incorrect *in fact:* the questions involved being purely questions of law. That these questions of law were really disputable and that their pendency left everybody honestly doubtful of his rights is demonstrated by the proceedings in the Supreme Court of Illinois in what is known as the Fayart case. At the relation of the taxing authorities an application was made in that case to the Supreme Court of Illinois by the State for a mandamus to compel an insurance agent to make his company's return on Form 16. After due consideration the Court (on December 18, 1928) delivered a unanimous opinion per Duncan, *J.*, that the 30th section of the Act of '69 was unconstitutional and void as being unlawfully discriminatory and not susceptible of equalization by adjustment and declared that Form 16 fell with the Act. The Court will note that this was two years after the decision of this Court in the Hanover case, and that the Illinois Court went farther in the Fayart case than this Court had gone in the Hanover case. Thereupon the State sought a reargument. The Court dismissed the State's petition but of its own motion ordered a reargument; whereupon the State proceeded to withdraw its application for a mandamus, thus terminating the case and preventing the question from being authoritatively decided. The appellee therefore is right in the assertion that the decision in the Fayart case does not stand as a judgment of the Supreme Court of Illinois. But we are equally right in asserting that the course of the proceeding in that case shows conclusively that the appellant, during the years in question, was not acting perversely when it refused to use Form 16 and substituted returns of its own.

## IV.

The next question is whether, as contended by the appellee, all the points which appellant now makes were considered and disposed of by this Court in the Hanover case.

It is true, as stated by the appellee, that the Hanover case was a test case in the outcome of which the appellant and 207 other foreign companies were interested. It is also true (as will be explained later in this brief) that after the decision in the Hanover case all of the companies were aggrieved by the way in which the State proposed to apply the principles announced in that decision. However, all but seventeen of the companies made a compromise with the State. The appellant is one of the seventeen that did not thus compromise and is now seeking (for itself and them) a final judicial determination of their rights. The appellant is of course not questioning the soundness of the decision in the Hanover case. On the contrary, the appellant is relying on that decision and is not now consciously urging any proposition inconsistent with what was there decided. Nevertheless the appellee contends that this Court in the Hanover case decided that no unjust discrimination results from taxing the appellant on its casualty business and not taxing its competitors; and further contends that this Court in the Hanover case had before it the question of the deductibility of losses and must be taken to have decided it against the appellant.

It is confidently submitted that the appellee is wrong on both points.

The Hanover case involved the tax assessed for a single year only—1923. It is a fact, as correctly asserted by the appellee in its brief in the instant case (p. 11) that in that

year the taxing authorities did not include casualty receipts in the tax assessment then complained of. The question on that point now raised by the appellant could not have been considered in the Hanover case otherwise than as a moot question. Moreover the reference to the subject in the opinion of Chief Justice Taft is obviously a mere statement of what had theretofore been decided on this subject by the Illinois Court. He merely cites and summarizes the decision of that Court in *Fidelity & Casualty Co. v. Board of Review*, 264 Ill. p. 11. We submit that the question of the validity of the resulting discrimination against the appellant is ripe for decision upon the record and that it has never been passed upon by this Court.

As to the deductibility of losses, it is true that Chief Justice Taft, in stating what the Illinois law was on the subject, cited and summarized the decision in *National Fire Insurance Co. v. Hanberg*, 215 Ill. 378,—the case in which the Illinois Court held that "net receipts" in Sec. 30 of the Act of '69 meant gross receipts less the expenses of the business not including losses. But it is also true (as conceded by the appellee on p. 21 of the appellee's brief in the instant case) that the appellant's claim of right to deduct insurance losses was never made until after the record in the Hanover case had been made up. It is difficult to understand how now it can seriously be argued that appellant is precluded from urging upon this Court a point never yet urged before it.

A study of the opinion in the Hanover case shows that two problems received this Court's entire attention: first, was there unjust discrimination against a foreign corporation through failure to debase the valuation of its property?—and, second, if so, could this be justified as an exercise of the State's power to prescribe the terms upon

which foreign corporations may do business within it? Having decided that there *was* discrimination and that it could not be justified on the State's theory, the judgment below was reversed with a procedendo. If the judgment had been affirmed in the Hanover case there would be weight in the argument that appellant cannot now advance a reason based on then-existing facts why the case should have been decided the other way. Even on the supposition of affirmance, however, no valid reason could be given against the right to raise now a question which could not have been raised on the former record. But when it is recalled that the judgment, instead of being affirmed, was reversed with a procedendo surely it is in order for the successful litigant to call this Court's attention to subsequent disregard, as to 1927, by the taxing authorities and by the Court below of the principle of equalization by debasement laid down here and to advance two more instances of unjust discrimination at least equally as serious as the one previously condemned by this Court.

## V.

The appellee contends that the record in the instant case fails to disclose facts sufficient to establish the discrimination of which the appellant complains as between itself and foreign casualty insurers. It is respectfully submitted that this contention has no foundation in fact.

It is conceded by the appellee that in Cook County, during the year 1927, two general classes of property insurance were being done. One was fire, marine and inland navigation insurance; the other included insurance against lightning, tornado and a large variety of similar risks, explosions (other than steam boiler), sprinkler leakage,

automobile, vehicle and other like insurance. (Record p. 159.) A complete list of the sorts of insurance included in the second category (which in this brief is for convenience referred to as casualty insurance) will be found in the second assignment of error on page 159 of the Record.

Insurance of the former sort can be written in Illinois only by insurers (domestic or foreign) organized to do a fire, marine and inland navigation insurance business. Casualty companies are prohibited from underwriting risks of this class. By Acts passed in 1879 and subsequently (see Appellant's Brief pp. 10-11) the fire, marine and inland navigation insurers were authorized to engage also in insurances of the second sort. By an Act adopted in 1899 foreign casualty companies were authorized to transact in Illinois insurance business of the second sort.

Such being the situation as far as the statutes are concerned, it was stipulated (see Record p. 99) "that foreign casualty insurance companies also carried on such competitive business and were not taxed on their net receipts derived therefrom." "Such business" refers to the whole field of insurance of the second of the two categories specified above, *i. e.*, all forms except fire, marine and inland navigation.

With these facts before it, the Court has all the information which it needs to determine whether it is fair to the fire insurance company which also does a casualty business that it should be taxed in respect of the latter when foreign casualty insurers (individual or corporate) are engaged competitively in precisely the same kind of casualty business and are exempt from any taxation in respect of it. It is, of course, understood, that both the appellant and the foreign casualty insurer pay the privilege tax of 2 per cent.

on gross receipts for the right to do business in Illinois and that they also pay the personal property tax. The appellant is called upon to pay the net receipts tax and the casualty insurers are not called upon to pay it.

It would have been idle for the appellant to encumber the record with descriptive statements of what the insurance business is. This is matter of common knowledge. It would have been a waste of the Court's time to give detailed proof of the magnitude of the business of the foreign casualty insurers and financial statistics respecting the extent of the competition. The form of stipulation follows that which was the basis of the judgment of this Court in *Quaker City Cab Co. v. Pennsylvania.* A reference to the record in that case on file in the office of the Court will show (p. 5 thereof) that, apart from a set of figures concerning the business of the appellant and a brief description of the taxicab business, the only fact related to the discrimination complained of was the following: "7. The defendant is subjected to competition in its business by individual, partnership and unincorporated taxicab operators." All that the Court needs to know is that the business done by the appellant and by the foreign casualty insurer is identical, that the two insurers are in competition with one another and that the appellant is taxed while its competitor is not.

The appellee on page 48 of appellee's brief seeks to create the impression that at least some of the foreign casualty insurers were, by an Illinois Act of 1911, subjected to the same burden of taxation that rests upon the appellant. Not only, however, does the suggestion thus made apply only to foreign casualty insurers that are unincorporated, but even among such unincorporated insurers it applies only to the extremely restricted class of so-called "reciprocal insurers", *i. e.,* unincorporated groups formed for a narrow

class of mutual insurance. The fact is undisputed and indisputable that as to the great lines of insurance included in the second of the two categories above specified, casualty insurers pay no taxes while the State seeks to impose them on the appellant.

The appellee attempts to distinguish the instant case from the Quaker City Cab case and to bring it within the principle applied in Pacific Express Co. v. Seibert, 142 U. S. 339. The former case was fully discussed in appellant's original brief. Suffice it to remind the Court that the instant case is *a fortiori* to the Quaker City Cab case. There it was a debatable question whether it was not justifiable to except an individual operator in a certain business and to tax a corporation engaged in the same business. In the instant case the discrimination is not as between a corporation and an individual but as between a corporation engaged in a specified business and others engaged in the identical business, whether they be incorporated or not.

In the Seibert case the tax was imposed upon the gross receipts of "any person, persons, joint stock association or corporation" which convey property "by express on contract with any railroad or steamboat company" and exempted railroads and steamboat companies. This Court merely held that there was no invalidity merely because railroads and steamboat companies were exempted because (142 U. S. p. 354):

> "They do not do business under the same conditions, or under similar circumstances. In the nature of things, and irrespective of the definitive legislation in question, they belong to *different classes.*"

That statute taxed all express companies whether corporate or non-corporate, and does not sustain the attempted classi-

fication in the case at bar. The decision merely sustained the proposition that express companies may be classed and taxed separately from railroads and steamboats.

## VI.

The appellee attempts to justify the refusal to permit appellant to deduct losses from gross receipts not (after stating that domestic competitors get the benefit of such a deduction.

The attempted justification (pp. 20 et seq. of appellee's brief) takes the form of an elaborate statistical argument designed to show that unless appellant is taxed on gross receipts diminished only by certain expenses and certain losses, the State of Illinois will not be able to reach for taxation all the intangible elements of value which appellant company possesses. The answer is that, just as Illinois subjects its domestic insurance companies to a capital stock tax, so the state of the domicile of each of the foreign companies concerned in this suit may do the like. What Illinois in fairness should do in the case of a foreign corporation is (if it is imposing a property tax) to determine what property the foreign corporation has in the State at a given time and then tax such property. This is what is done in the case of the Illinois capital stock tax on domestic companies of appellant's class. They pay on what is left of their property at the end of the tax year. The difficulty in equalizing a net receipts and capital stock tax grows out of the fact that a net receipts tax falls on receipts that come in day by day, whereas the other tax fastens only upon the residuum of value at the end of the year. It is a fact in this case that the appellant's expense ratio (gross

by the taxing authorities) is 30 per cent. and its loss ratio is not less than 45 per cent. (Record 107). If a tax is levied —not on 25 per cent. of gross as it should be, but on 70 per cent. of gross, it is idle to call such an exaction a property tax and to justify it on the ground that the State needs the money.

To the appellee's suggestion that domestic insurance companies presumably have a large amount of tangible personalty in the State and that foreign companies do not, the obvious answer is two-fold: first, that there is in fact no such presumption, since an agency equipment may be more extensive than that of the home office; and, second, that even such a presumption does not explain why Illinois taxes foreign fire companies on their net receipts and does not tax foreign casualty companies on theirs.

It is earnestly submitted that if the principle of equalization laid down in the Hanover case is applied to sec. 30 of the Act of '69 it must result in the deduction of losses before it can be determined what, *as property*, is left of the gross premiums that have been received.

## VII.

With respect to the failure to debase the tax valuation for 1927, the appellee has fallen into a serious mistake of fact. Referring to a statement in appellant's original brief to the effect that appellant did not get the benefit of debasement in that year, the appellee (p. 53) has this to say: "This same statement, in substance, was made in the brief for appellant in the Supreme Court of Illinois and was there so clearly shown to be untrue that it was abandoned by appellant's counsel and, for that reason, was not noticed in that court's opinion." In point of fact, not only was the

contention of the appellant strongly presented to the Supreme Court of Illinois in brief and in oral argument but the failure of the Court to accept the contention was made by the present appellant the subject of a petition for rehearing—from paragraph I of which we quote:

> "Petitioner respectfully points out that this Honorable Court erred in treating the tax for 1927, assessed by the Board of Review in 1928, as a valid and legal tax. Clearly the different treatment given the 1927 tax by the Court was the result of the misapprehension of the stipulated and uncontradicted evidence in the record. The oversight doubtless arises from the fact that on the trial below and in this court, the parties treated the taxes for the years 1923 to 1927, and each of them, as governed by the same principles. The Court, in its opinion, has drawn a distinction, treating the 1928 assessments by the Board of Review of 1923 to 1926 net receipts as void, but giving validity to the assessment for 1927. The case at bar is a test case (Abst. 6); sixteen other similar suits against other companies are made dependent upon its final outcome. If the Court fails to reconsider its erroneous treatment of 1927 taxes, the litigants in all of the cases in question will be required to pay $57,394 more than they would be required to pay if this Court treated the liability for 1927 taxes in the same manner and according to the principles under which the taxes for 1923 to 1926, inclusive, are treated. We, therefore, earnestly submit that all other questions apart, the ends of justice require a reconsideration of the amount of the tax imposed for the year 1927."

Again and again the appellee refers to the fact that the returns made by appellant were not made on the form demanded by the taxing authorities. The justification for

the appellant's course has already been set forth in this brief and is, we submit, complete. Even were the principle invoked by the appellee to be applied it would merely preclude the appellant from questioning the appraisement or valuation made by the taxing authorities: it would not deprive the appellant of its right to have that valuation debased to 60 per cent. thereof. That this was the constitutional right of the appellant was determined in the Hanover case.

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In conclusion, we submit that

(1) There is no legitimate basis for a classification which results in taxing foreign fire companies on their casualty business and exempting foreign casualty insurers that compete with them. Both are foreign insurers, the class of business done is the same. That is the beginning and end of the matter.

(2) There is no legitimate basis for a classification which results in imposing a tax on the property of domestic fire insurance companies, as valued after their losses have been deducted, while imposing a tax upon the intangible property of foreign fire insurance companies represented by their receipts without permitting the deduction of their losses. The only difference between the two companies is that one is foreign and the other is domestic. When once (as in this case) the foreign company has paid 2 per cent. upon its gross receipts for the privilege of doing business in Illinois, the significance of the geographical distinction is removed. This Court, in the Hanover case, was therefore clearly right in holding that if the property of domestic companies is debased to 30 per cent. for the purpose of the

tax, the property of the foreign companies must be likewise debased. It inevitably follows that if domestic companies are permitted to deduct their losses, foreign companies should likewise be permitted to deduct theirs.

Respectfully submitted:

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